Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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**No. 79-793**

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HOUSTON LIGHTING AND POWER COMPANY

and

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
*Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
BURLINGTON NORTHERN, INC.,
THE COLORADO AND SOUTHERN RAILWAY COMPANY,
FORT WORTH AND DENVER RAILWAY COMPANY,
THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, and SOUTHERN PACIFIC TRANSPORTATION COMPANY,
*Respondents*

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**On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF OF PETITIONERS

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Dated: February 8, 1980

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### I

### INTRODUCTION

The arguments of the Federal and the railroad Respondents seek to cloak these cases in wraps of

ordinariness, thereby dissuading the Court from assuming jurisdiction. As told by the Federal Respondents, these cases present routine examples of "traditional evaluation" (Brief of the Federal Respondents, p. 7) by the Interstate Commerce Commission and as such present no important questions.

These proceedings emphatically do not involve the "factors traditionally considered in determining the reasonableness of rail rates" (Brief of the Federal Respondents, p. 5), but instead present the Commission's first attempts to implement the new rate regulatory regime enacted in the *Railroad Revitalization And Regulatory Reform Act Of 1976 ("4-R Act")*, Pub.L.No. 94-210, 90 Stat. 33. Elsewhere, in a proceeding where the issues are identical, the Department of Justice described them to a lower court as "difficult and important legal issues which impact on the policies of several federal agencies."[1] The Federal Respondents do raise one new argument, however, which requires this reply.

## II

## THE NEW INTERIM APPROACH ARGUMENT

In its opinion the court below was under the misapprehension that in these cases it was reviewing a temporary approach to ratemaking in force pending the completion of a more fully considered rulemaking case (Pet. App. 33a).[2] The Federal Respondents con-

[1] Joint Motion for Enlargement of Time to File Respondents' Brief at 2 (Dated July 24, 1979), *Celanese Chemical Co.* v. *I.C.C.*, No. 78-3651 (5th Cir., filed Dec. 4, 1978).

[2] That case was *Ex Parte 338, Standards and Procedures For The Establishment of Adequate Revenue Levels* (Decision Served Feb. 3, 1978) (unprinted) *as modified*, 359 I.C.C. 270 (1978).



tinue to represent that the approach is interim, but now suggest that the standards and guidelines will be forthcoming in an entirely different case.[3]

This newly-devised position is, of course, necessitated by the agency's total failure to quiet down the furor over its coal ratemaking orders in the proceeding in which Judge Leventhal was led to believe that these issues would be carefully considered. While the Federal Respondents are continuing to pray for deferential judicial scrutiny of the I.C.C.'s orders on the ground that "more precise standards and guidelines" are in the offing (Brief of the Federal Respondents, p. 8 n. 4), this position completely disregards the fact that these rates are immutable for the petitioners unless the Court acts,[4] and the forthcoming future and "comprehensive" standards will be of little solace to petitioners.

## III

## CONCLUSION

The attempts of Respondents both to downplay the important issues in these cases, while at the same time arguing that they are sufficiently consequential to be the subject of major rulemaking cases wherein they will be resolved, must not succeed. Absent action by this Court, millions of Texas and Arizona electric customers will pay exorbitant freight rates whose levels are immune to the modification which ultimately

[3] *Ex Parte 347, Western Coal Investigation—Guidelines For Railroad Rate Structure.*

[4] Under the statutory provision governing capital incentive rates, such rates cannot be set aside by the Commission for a period of five years after becoming effective. 49 U.S.C. § 10729; Joint Petition, p. 16.

must come from the various rulemaking cases stressed by the Federal Respondents.

Respectfully submitted,

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